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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 625

CECIL I. HUST,

Petitioner,

vs.

MOORE-McCORMACK LINES, INC.,

Respondent.

PETITIONER'S REPLY BRIEF AFTER ORAL ARGUMENT

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INDEX

Subject Index

Petitioner's reply brief after oral argument . . 1

Table of Cases Cited

Armit v. *Loveland*, 115 F. (2d) 308 . . 9
Bacarrat v. *Mahoney*, 1933 A. M. C. 1652 . . 5
Barge Carriers, Inc. v. *Atlantic and Gulf District of the Seafarers' International Union of North America*, Case No. 10-C-1382 . . 7

Statutes Cited

Civil Service Retirement Act . . 4
Employees Compensation Act . . 4
Executive Order No. 9054 . . 2
Merchant Marine Act of 1936 (46 U. S. C. A. 1128f) . . 2
Public Law No. 17 . . 2, 3, 4
Suits in Admiralty Act (46 U. S. C. A. 742) . . 3
United States Code, Title 50, Section 1291 . . 3
Section 1294 . . 8

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We do not understand the first question as framed by the respondent to accurately reflect the issue raised at the oral argument. The question as raised by the respondent is, does the War Shipping Administration have authority to operate the vessels and to enter into the General Agency Agreements for the operation of those vessels? The respondent then proceeds to analyze the Merchant Marine Act of 1936, as well as the subsequent acts in urging that there was such authority on the part of the War Shipping Administration. As we understand the question put by the Court, the Court first pointed out the provisions of the Act of 1936 which gave certain rights and expressly preserved the rights of seamen under the existing law, and then the Court wanted to know whether there has been any act sub-

sequent to the 1936 Act which superseded that Act or modified it in such a way as to give the War Shipping Administration greater powers, and particularly, powers on the basis of which the existing seamen's rights could be impaired. While this may not be the phraseology employed by the Court, we think this is the general purport of the Court's question.

It will be noted from the Executive Order (9054) which is so strongly relied upon by the respondent that the Government intended primarily to transfer the functions of the United States Maritime Commission to the War Shipping Administration, and it will be noted further that this was intended to permit the War Shipping Administration to "control" the operation of the merchant vessels. Thus the War Shipping Administration was merely substituted for the United States Maritime Commission, and it may be stated that the latter Acts did not in any material respect supersede or nullify any of the provisions of the 1936 Act, at least so far as the issues are here concerned.

To direct ourselves to the question raised by the Court as we understand it, we think it is fair to state that there has been no change in the subsequent legislation which would impair the rights which were expressly reserved to the seamen under the 1936 Act (46 U. S. C. A. 1128(f)). As will be pointed out briefly hereafter in connection with the following point, the only statute which the respondent seizes upon to support its position is Public Law 17. We submit that that Act has absolutely no bearing on the issue before the Court. Suffice it to say with respect to the first point, therefore, that neither the 1942 Act nor any of the other Acts required any change in the operation of the vessels as they had theretofore been operated under the 1936 Act. Under the latter enactment, the vessels were operated through general agents as in the *Brady* case, and there is no language to sustain any suggestion that the War Shipping Adminis-

tration was intended to itself operate the vessels under the later legislation in any different manner than under the prior procedure. In any event, there is no provision which expressly or even inferentially impairs the existing rights of the seamen which were expressly preserved under the 1936 Act.

The next argument taken up by the respondent involves the applicability of Public Law 17 to the issues at bar. It is suggested that under that Act the seamen could only be considered as Government employees and are not entitled to a jury trial in any respect. It is urged from that premise that there can be no right of action against the general agent. We submit that this contention cannot stand analysis.

In outlining the provisions of P. L. 17, respondent admits that this Act did not change any of the existing rights; that all that it did was to extend the same rights of seamen on merchant vessels of the United States to seamen on public vessels of the United States and to require administrative disallowance of any claim before the filing of a suit in order to prevent unnecessary or premature litigation against the United States. To begin with, a reference to the Act discloses that at the very outset (50 U. S. C. A. app. 1291) the members of the crews employed on vessels as employees of the United States shall have all of the rights and benefits applicable to seamen employed on privately owned and operated vessels. Before going further, we may state that this clause added nothing to the existing law since under the Suits in Admiralty Act (46 U. S. C. A. 742) any member of the crew could proceed against the United States by a Libel in Admiralty with the same rights and privileges which were accorded to any member of the crew of a privately owned or operated vessel.

Perhaps the most important provision of P. L. 17 follows the clause above set forth and provides that these sea-

men, because of the temporary wartime character of their employment, shall not be considered as employees of the United States for the purposes of the Employees Compensation Act, the Civil Service Retirement Act and certain other enumerated benefits accorded to Federal employees. The most searching scrutiny of P. L. 17 fails to disclose any provision which attempts to regulate or which refers in any way to the relationship between the seamen and the general agents or operators. It is clear beyond doubt that P. L. 17 was intended only to regulate those suits which could be brought against the United States. The liability of a general agent had already been determined by the decision in the *Brady* case before the enactment of P. L. 17, and it may be assumed that Congress was fully aware of the liability of a general agent irrespective of the liability of the United States. The public hearings which have been frequently referred to show that the legislators were fully cognizant of the agents' liability. It is, therefore, reasonable to infer that if Congress intended to nullify or otherwise modify the liability of the general agent, it would have expressly made such provision in the Act. As Mr. Justice Douglas pointed out in the opinion in the *Brady* case, if Congress had intended to restrict the seamen's rights against the general agent, it would have said so in clear and unambiguous terms. The fact that Congress made no mention of the general operators' liability shows that the Act was not intended to affect the general agent's liability.

The next argument taken up by respondent is indeed interesting. It is stated: "Since the shipping articles are statutory in form and are always signed between Master and crew, why is it significant that they were so signed in this case?" Respondent, in its original brief, argued that because the contract in this case was signed between the Master and the crew that the crew must, therefore, be

considered as employees of the United States inasmuch as the Master was himself considered an employee of the United States. It was not until we pointed out that the shipping articles which were entered into by the Master were statutory in form and were always so required to be executed that the respondent's argument then lost all its force. We submit that it is because of that fact that the respondent now seeks to minimize the importance of the statutory articles. In this same connection, the sweeping statement is made that the Master, in engaging the seamen, has always acted for the "owner" of the ship, but significantly, no authority is cited in support. The authority, we submit, is to the contrary as in *Bacarrat* v. *Mahoney*, 1933 A. M. C. 1652, where the Court said that so far as third persons are concerned, the Master is considered the agent of the operator and not the owner.

Respondent continues with a discussion of the criteria which characterizes an owner pro hac vice. We submit that the very authorities cited fail to sustain respondent's position. We shall not burden the Court with repetition of the argument which we have already made in our prior brief. It need only be added that an examination of the cases cited do not place the same emphasis and interpretation on the terms as is set forth by the respondent. So far as the actual navigation of the ship is concerned, no owner or operator could ever interfere with the Master of a vessel, either in the navigation or in the management of the internal affairs of the vessel. It is essential only to show that the operator has the constructive possession of the vessel and the management of the vessel's business in order to fall within the category of an owner pro hac vice. Nor is there anything inconsistent in the suggestion that there can be more than one operator or owner pro hac vice who would be liable for the same things arising out of the operation of the vessel. As a matter of fact, the opinion

in the *Brady* case points out that very fact and states that the seaman had a dual remedy, one against the United States and the other against the agent, because of the substantial control which it exercised over the vessel's management. Whatever might be the liability of the United States, that fact cannot operate in mitigation of the general agent's liability, if the latter in fact exercised any substantial control over the management and operation of the vessel. While we shall not undertake to answer categorically each and every statement of the respondent, there are several which cannot go unchallenged. It is stated on page 32 of the respondent's Brief that the agent cannot select the Master; that all it can do is to produce him for the United States to pass on and reject or accept. This is certainly not substantiated by the facts or by an analysis of the agreement itself. On the contrary, it is the general agent who actually does engage the Master, and it is subject only to the approval of the War Shipping Administration. The latter at no time undertakes to accept or reject in the sense suggested by the respondent. It can even be stated from the terms of the contract itself that the agent is free at any time to "hire and fire" a Master and only the hiring must be subject to the approval of the War Shipping Administration. The contract, as well as the actual testimony, leaves no room for doubt but that the general agent is responsible to the War Shipping Administration for the engagement of the proper personnel. It is the general agent who must actively engage in the procuring of the crew in the same manner that it has always done. In this connection, it is relevant also to point out (Exhibits 14, 15, 18, 19, 20) that the general agents negotiated with the Unions for the engagement of these crews under union agreements between those general agents and the unions. The Statement of Policy (R. p. 167) reserves the right to bargain with the agents under the regular machinery. Perhaps one

of the most significant factors is the result of the investigation by the National Labor Relations Board in the case of *Barge Carriers, Inc.* v. *Atlantic and Gulf District of the Seafarers' International Union of North America*, Case No. 10-C-1382, where the status of a general agent was thoroughly investigated, and after careful deliberation, it was held that the general agent is the real employer of these men, and the general agent actually operates the vessels under only nominal supervision of the United States. Here is an impartial agency which holds a general agent accountable as an employer for the purpose of the National Labor Relations Act. We think that decision goes further than the Court need go in this case, but that decision clearly proves that from the actual and practical standpoint, and in the light of the existing agreement, it is the general agent who is the real party in interest so far as the operation of these vessels is concerned. At this point, it is also relevant to direct the Court's attention to the respondent's discussion concerning the compensation of the general agent. In attempting to explain some of the more substantial payments which are made to the general agent, in addition to compensation for other services, the respondent states: "These General Orders 12 and 34 will be easier to understand if it is realized that the general agents and the agents' duties were to 'husband' the ship." Apparently respondent has completely overlooked the significance of the "husbanding" of a vessel. As the Court will find from an analysis of the cases already set forth, that expression implies a relationship to the vessel which goes along with ownership or with operation as owner pro hac vice.

Respondent's fourth point attempts to distinguish between the duties of an owner during peacetime and an agent under the present contract. We submit that the analysis does not undertake to develop the true criteria which characterize an owner pro hac vice. An owner pro

hac vice could well be substituted for the agent in the analysis drawn by the respondent and he must still be held accountable for the liabilities of an operating owner. This is aside of the fact that several of the statements are not strictly accurate. As for example, the agent does have the right to make repairs to the vessel; he does have the right to equip, victual, supply and maintain the vessel; he does "man" the vessel in the same manner that he did before. The statement that the agent has no authority to give instructions to the Master is contrary to the fact. It may be stated that it is the agent who gives the instructions to the Master, and where the War Shipping Administration desires to issue any instructions, they do so through the agent. It may be stated in this connection, however, that the function of the War Shipping Administration is not to issue instructions, but rather to approve the instructions which are issued by the agent. Bills of lading, while they may be on behalf of the United States, are contracted for and entered into by the agent; while the War Shipping Administration provides War Risk Insurance, it is the agent who places the P. & I. Insurance with the private companies as in the case at bar. The statement that the agent cannot limit his liability is similarly erroneous, particularly in view of the Act of Congress which expressly confers upon the agents the right to limit liability (50 U. S. C. A. 1294). However, as we have stated, none of the things which have been pointed out by the respondent are material factors in connection with the operation of the vessel and which have always been considered as the controlling factors in the determination of an operator's status as an owner pro hac vice. The failure of the respondent to touch on these important factors clearly evidences that the respondent was unable to meet the real issue.

The discussion with respect to the provisions which absolve the general agent from just such claims as are involved at bar, namely, damages, wages and maintenance and cure, likewise fails to answer the query on this point raised by the Court. We submit that the fact that the reference appears in several places in the General Agency Agreement and the language so painstakingly indemnifies the general agent for liability on account of damages and maintenance and cure that the only reasonable inference is both the Government and the general agent expected that the general agent would be sued for these very items and provision accordingly was made to cover the agent's liability by insurance.

Finally, in discussing the Brief filed as Amicus Curiae on behalf of the Masters, Mates and Pilots et al., respondent interprets certain language to mean that the seaman's right to sue is based upon his employment relationship to the owner and the owner is liable only because he is an employer of the seaman. This interpretation does not correctly represent our view. We have expressly stated in the prior Brief that the liability arises out of the operation of the vessel itself and all those who exercise substantial control over the operation of the vessel thereby incur the liability of an operator-owner. Thus, in *Armit* v. *Loveland*, 115 F. 2d 308, there were several defendants, each of whom were shown to have some substantial part in the operation of the vessel, although the employment relationship is established as between only one. The Court held all of the defendants liable upon the ground that they were all involved in the operation of the vessel. It is not our position that these seamen are not employees of the general agent. On the contrary, we have always maintained that they must be considered as employees of the general agent, irrespective of their relationship to the United States. As we have

pointed out, the National Labor Relations Board similarly so found in the *Barge Carriers* case. The shipping articles themselves bear the name of the general agent as well as the name of the United States in connection with the engagement of the crew. All factors tend to show, particularly from the practical standpoint, that it was the general agent who was the real employer of these men. But notwithstanding the fact that the employment relationship may nevertheless be involved, the liability arises because of the agent's operation of the vessel.

As Mr. Justice Douglas pointed out in the *Brady* case, the seaman has two strings to his bow, one as against the United States and the other as against the general agent. These rights are cumulative and entirely consistent. If Congress had intended to nullify the liability of the general agent, we submit that it would have so stated in clear and unambiguous terms. The fact that it did not do so was in effect an implied expression of approval of the Brady decision.

Respectfully submitted,

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